Melody San Bruno, Inc. d/b/a Melody Toyota *and* International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge No. 190, Peninsula Auto Mechanics Local Lodge No. 1414. Case 20–CA–27104

May 29, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

On January 16, 1997, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Charging Party filed a limited exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the limited exception[1] and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified below.

The judge's recommended Order provides, inter alia, for the Board's standard backpay remedy in effects bargaining cases as modeled after the remedy set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). The Charging Party has excepted to the *Transmarine* remedy insofar as it requires the Union to request bargaining ''within 5 days of this decision.'' The Charging Party contends, inter alia, that ''[i]t is practically impossible to comply with the 5 day notice provision, particularly when decisions are put in the mail.''

We find merit in this exception to the extent that the Order language suggests, contrary to *Emsing's Supermarket*, 307 NLRB 421, 421–422 (1992), that a union must request bargaining within 5 days from the date of the Board's decision rather than, as *Emsing's* held, within 5 business days after receipt of the decision. As explained in *Emsing's*:

> After carefully considering both the policy consideration underlying the 5-day rules, i.e., the desire to encourage due diligence, and the practical exigencies imposed by mail and delivery services, we have decided that, in applying the *Transmarine* remedy, the countdown for the 5-day period for requesting bargaining begins on the first business day after the *date of receipt* of the Board's Decision and Order by the legal representative of the party obligated to request bargaining. The date of issuance of the Decision and Order is, therefore, irrelevant in computing the 5-day period. In addition, intervening Saturdays, Sundays, or legal state or Federal holidays shall be excluded in computing the 5-day period. Further, if the party requesting bargaining chooses to communicate its request by mail, by telegram, or by some other written form of communication, that communication will be timely if it is postmarked on or before the 5th day. Thus, there is no requirement that the written communication be received by the other party within the 5-day period. [Emphasis in original.]

In addition, during the 5-day period, there is no requirement that the union tender a bargaining proposal; the union simply needs to communicate to the Respondent its desire to begin negotiations. Further, contrary to the Charging Party's contention, the Order is consistent with normal Board bargaining orders which direct the respondent to bargain with the union *upon request*. Accordingly, we approve the remedy proposed by the judge, but we modify paragraph 2(a) of the Order in accordance with *Emsing's.*

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Melody San Bruno, Inc. d/b/a Melody Toyota, San Bruno, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a):

''(a) Pay the former employees in the unit described above their normal wages when in the Respondent's employ from 5 days after the date of this Decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the sale of the Toyota automotive dealership; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of the Union to request bargaining within 5 business days after receipt of this Decision, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from the date in October 1995, when the employee was terminated as a result of the sale of the auto dealership and the cessation of the Respondent's operations, to the time he or she secured equivalent employment elsewhere; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's em-

[1] No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with notice of the sale of its business and an opportunity to bargain concerning the effects on unit employees of its cessation of operations and sale.

ploy, with interest, as set forth in the remedy portion of this decision.''

2. Substitute the following for paragraph 2(c):

''(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.''

Jonathan J. Seagle, Esq., for the General Counsel.
David Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on August 15, 1996, in San Francisco, California. The complaint and notice of hearing issued on March 29, 1996, based on a charge in Case 20–CA–27104, filed on February 5, 1996, by the International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge No. 190, Peninsula Auto Mechanics Local Lodge No. 1414 (the Charging Party or the Union) against Melody San Bruno, Inc. d/b/a Melody Toyota (the Respondent). Posthearing briefs were submitted by the General Counsel and the Charging Party on September 5 and 13, 1996, respectively.

The complaint, as amended at the hearing, alleges that the Respondent, a corporation, operating an automotive dealership through October 1995, had long recognized and bargained with the Charging Party as representative of certain of its employees, but in October 1995, sold its assets and ceasedoperations with insufficient notice to the Charging Party and without providing the Union an opportunity to bargain with the Respondent respecting the effects of the sale and cessation of operations. This conduct is alleged to violate Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). The Respondent denies that it has violated the Act.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent had been, until October 30, 1995, a corporation, with an office and place of business in San Bruno, California, where it had been engaged in the servicing and sale of automobiles. The Respondent annually, through calendar year 1995, purchased and received at its San Bruno, California facility goods valued in excess of $5000 from points outside the State of California, and derived gross annual revenues in excess of $500,000.

Based on the above, I find that the Respondent at relevant times was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

At all material times the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

At relevant times the Respondent's president was Billy J. Wilson and its general manager was Joseph Durelli. These two individuals were stipulated to be supervisors and agents of the Respondent at relevant times.

The Respondent and the Charging Party had a longstanding collective-bargaining relationship. The most recent collective-bargaining agreement by its terms extended from July 1993 to July 1997, and covered approximately 18 employees in the following unit[2] (here the unit):

> All service advisors/dispatchers and all employees engaged in the repairing, refinishing and maintaining of all automobiles, trucks, tractors, trailers, motorcycles of Melody San Bruno Inc. at its Melody Toyota, San Bruno, California operations excluding guards and supervisors as defined in the Act.

B. *Events*

Glenn Gandolfo, a business representative employed by Automotive Trades District Lodge 190 and assigned to Local Lodge 1414, had represented the Charging Party in its dealings with the Respondent for approximately 10 years until the events in question. He testified to a series of events in the summer and fall of 1995.[3]

Gandolfo had been dealing with Durelli, the Respondent's general manager, respecting grievances in the summer of

[1] The Respondent, through counsel, filed an answer to the complaint. By formal Substitution of Attorneys filed on June 24, 1996, counsel for the Respondent withdrew from the case and the Respondent's president, Mr. Billy J. Wilson, was designated as the Respondent's representative and thereafter represented the Respondent. In a pretrial telephone conference call, Wilson indicated that he would not appear and participate in the hearing in the matter although he did enter into certain stipulations with counsel for the General Counsel which were placed into the record by the Government. The Respondent did not appear or offer evidence at the hearing.

[2] While the unit may have originally been two units, the parties under the contract dealt with the combined group. There is no unit description as such in either the contract or the complaint. Rather, each refers to all nonsupervisory work as described in the contract. The unit description used herein is assembled from the work description portions of the contract.

[3] Gandolfo was the only witness at the hearing who testified about the events concerning the sale and notice to the Union. His demeanor was sound and his recollection clear. I fully credit his testimony.

1995.[4] In July he asked Durelli about rumors that the Respondent had its Toyota automobile dealership up for sale. Gandolfo testified that Durelli told him: ''[T]he place is always up for sale, you know. If the right person comes along with the right price, you know, salesmen, they'll sell anything,'' but added that no sale was then in progress. Again, in mid-September during other business Gandolfo braced Durelli with questions about a sale of the operation. Durelli confirmed the dealership was for sale, but suggested that certain regulatory and other problems existed which would delay any sale, even if it went through, into November or into the next year.

In mid-October, after receiving reports from employees that the business was in the process of being sold, Gandolfo called Durelli and asked again about a possible sale. He described Durelli's answer:

> And [Durelli] said, yes, it is being sold, but he says, we still have, you know, some major hurdles to overcome. Toyota still hasn't given approval. There's this whole issue of whether or not the land and building is going to be sold now because of the—they're trying to work around the EPA things. If it's not sold; if it's just leased and so forth. He says.
>
> So it's definitely being sold, but when, he couldn't give me a date. He couldn't give me a time. He wasn't really sure. And as he kind of explained to me, was, you know, I'm the general manager, but, obviously, I'm not involved in the sales so I can't give specific details.

A few days later on Friday, October 20, employees were reporting to Gandolfo that a sale was in process and that they were to be laid off that day or perhaps the following Monday, October 23. Gandolfo testified that he immediately tried to reach Durelli by phone at the dealership but was told he no longer worked there. Gandolfo then undertook an ongoing effort to reach any management official of the Respondent to discuss the closure. He tried to reach Wilson by telephone on Friday, October 20, and thereafter through the next week, but was told on each occasion that Wilson was unavailable. All his efforts to reach knowledgeable agents of the Respondent were unavailing save that he reached Parts and Service Director Scott Fuller, later in the week of October 23, who told Gandolfo that the dealership had been sold and that another dealership had purchased it and would take over all operations within a few days.

By October 30 the sale had apparently been consummated. Gandolfo testified that the individuals who answered the telephones at the dealership premises asserted they were a new and separate business entity not associated with the Respondent and professed not to have knowledge of the Respondent's current business location or even the physical location of the Respondent's principals or other agents. In response to continued inquiries the individuals employed by the new entity consistently took the position that they were simple purchasers and had no knowledge of or responsibility for the Respondent.[5]

Thereafter Gandolfo tried unsuccessfully to locate Wilson and was not even able to obtain his home telephone number let alone devise a way to speak to him or reach him by letter. No certain contact was made with the Respondent in the remainder of the year, although the Union sent a grievance respecting the closure to the dealership's address in the hope that the material would be somehow forwarded to the Respondent agent. On this record, other than the contacts relating to the instant litigation, the Respondent has not dealt with the Union concerning the closure in any fashion whatsoever to date.

Analysis and conclusions

It is longstanding Board doctrine that an employee has an obligation, under the Act, to notify a labor organization representing its employees of a decision to end its operations sufficiently in advance of the termination so as to afford the union a fair opportunity to request and engage in bargaining concerning the effects of the decision to cease operation on represented employees. *Transmarine Navigation Corp*., 170 NLRB 389 (1968).

The complaint alleges that the Respondent failed to give notice to, and provide an opportunity to the Union to request and engage in bargaining concerning the effects of the sale and discontinuance of the Respondent's auto dealership operations on the unit employees. The General Counsel and the Charging Party argue that the scant and indirect oral assertions from the Respondent's agents described above respecting the possible sale of the business made by Durelli and Fuller to Gandolfo, were clearly not sufficient to fulfill the Respondent's obligation to timely notify the Union of the sale and cessation of operations and provide the Union with an opportunity to bargain respecting the effects of the sale on represented employees citing *National Car Rental System*, 252 NLRB 159 (1980), enfd. in relevant part 672 F.2d 1182 (3d Cir. 1982).

I find that the information communicated by the Respondent's agents was never sufficiently certain to rise to the level of actual or constructive notice to the Union of a sale and, further, that the sale occurred before the Union could locate an agent of the Respondent on whom it could make a demand to negotiate respecting the effects of the closure on represented employees. On this record the Union was presented with a classic fait accompli and had no chance whatsoever to communicate a bargaining demand or engage in bargaining before the operations was closed. Having been unable to locate an agent of the Respondent, it was impossible for the Union to request or engage in effects bargaining. Thus, it is clear and I find that the Respondent, in failing to provide notice and an opportunity to bargain to the Union respecting the effects of its closure of operations sale of the business on represented employees, wrongly prevented any bargaining from occurring. Based on all the above, I find the actions and omissions of the Respondent violated Section 8(a)(5) and (1) of the Act. I, therefore, sustain the allegations of the complaint.

[4] Unless otherwise indicted all references hereinafter refer to 1995.

[5] A Toyota automotive dealership doing business as Melody Toyota commended operations with the cessation of the Respondent' operations and apparently continues to operate at the facility. There is no contention on this record, however, that the new commercial entity is in any manner involved in the instant matter.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom, and further ordered to take certain affirmative action designed to effectuate the policies of the Act. Respecting the directed remedy, I shall follow the Board's lead case in this area: *Transmarine Navigation Corp*., supra, as well as the Board's recent modifications to its standard remedy in *Indian Hills Care Centers*, 321 NLRB 144 (1996). Interest on sums due shall be calculated as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. The Respondent has been at all relevant times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with notice of the sale of its business and an opportunity to bargain concerning the effects of its cessation of operations and sale of its automobile dealership on its represented employees in the following unit:

> All service advisors/dispatchers and all employees engaged in the repairing, refinishing and maintaining of all automobiles, trucks, tractors, trailers, motorcycles of Melody San Bruno Inc. at its Melody Toyota, San Bruno, California operations excluding guards and supervisors as defined in the Act.

4. The unfair labor practice described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Melody San Bruno, Inc. d/b/a Melody Toyota, San Bruno, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to give the Union sufficient notice of its sale of its automotive dealership and an opportunity to bargain with respect to the effects of the sale on represented employees in the following unit:

> All service advisors/dispatchers and all employees engaged in the repairing, refinishing and maintaining of all automobiles, trucks, tractors, trailers, motorcycles of Melody San Bruno Inc. at its Melody Toyota, San Bruno, California operations excluding guards and supervisors as defined in the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay the former employees in the unit described above their normal wages when in the Respondent's employ from 5 days after the date of this decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the sale of the Toyota automotive dealership; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of the Union to request bargaining within 5 days of this decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from the date in October 1995, when the employee was terminated as a result of the sale of the auto dealership and the cessation of the Respondent's operations, to the time he or she secured equivalent employment elsewhere; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ, with interest, as set forth in the remedy portion of this decision.

(b) On request, bargain collectively with the Union with respect to the effects on unit employees of its decision to sell its automotive dealership, and reduce to writing any agreement reached as a result of the bargaining.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, mail at its own expense an exact copy[7] of the notice attached hereto, marked ''Appendix''[8] to the Union and to all former unit employees who were employed in the month of October 1995, at the Melody Toyota auto dealership.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] Copies of the notice, on forms provided by the Regional Director, may prior to transmission to the Respondent be amended by the Regional Director to include a translation of its terms in such other languages as the Regional Director determines are necessary to fully communicate with former employees.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

This notice has been mailed to the Union and to All Employees who were Employed by Melody San Bruno, Inc. d/b/a Melody Toyota in the advisors and mechanics bargaining unit during the month of October 1995.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to mail this notice to our former employees as described above and to abide by its terms.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

An Employer subject to the National Labor Relations Act must collectively bargain with the labor organization that represents its employees concerning wages hours and working conditions. While an employer need not bargain with a union about its determination to cease all operations and go out of business, it must give the union notice of such a decision and an opportunity to bargain concerning the effects of such a sale and closure upon the employees the Union represents.

WE WILL NOT fail and refuse to notify the International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge No. 190, Peninsula Auto Mechanics Local Lodge No. 1414 of our decision to sell and close our automotive dealership and WE WILL NOT fail and refuse to provide the Union an opportunity to bargain respecting the following unit of employees respecting the sale and closure.

> All service advisors/dispatchers and all employees engaged in the repairing, refinishing and maintaining of all automobiles, trucks, tractors, trailers, motorcycles of Melody San Bruno Inc. at its Melody Toyota, San Bruno, California operations excluding guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees and employee applicants in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request bargain collectively with the Union with respect to the effects on unit employees of its decision to sell our automotive dealership and reduce to writing any agreement reached as a result of the bargaining.

WE WILL pay the former employees in the unit described above, who were employed at the time of our sale and closure, their normal wages, with interest, for a period set forth in the decision underlying this notice to employees.

MELODY SAN BRUNO, INC. D/B/A MELODY TOYOTA